

**Dorsey Trailers, Inc., Northumberland, PA Plant
and United Auto Workers International Union
and its Local 1868. Case 4-CA-21968**

September 6, 1996

ORDER GRANTING MOTION

**BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX**

On July 5, 1996,¹ the National Labor Relations Board issued its Decision and Order in this proceeding.² The Board found, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting bargaining unit work without first providing the Union notice and opportunity to bargain over the decision. The Board ordered the Respondent to rescind the subcontracting decision and to bargain on request with the Union over any such decision in the future.

On August 16, the General Counsel filed a motion to modify the Board's Order to provide a make-whole remedy for unit employees who may have lost overtime earnings as a result of the Respondent's unlawful subcontracting.³ On August 27, the Respondent filed an opposition, contending that the motion was untimely and that it lacked merit.

I. THE TIMELINESS ISSUE

The Respondent argues that, pursuant to Sections 102.48 and 102.49 of the Board's Rules and Regulations, the General Counsel was required to file his motion within 28 days after the service of the Board's Decision and Order on July 5. According to the Respondent, the motion is untimely because it was filed more than 28 days after July 5 and because no request was made for an extension of time. We find no merit to this contention.

Section 102.48(d)(1) of the Board's Rules provides that, in extraordinary circumstances, a party may move for reconsideration, rehearing, or reopening of the record after the Board issues its decision or order. Section 102.48(d)(2) provides that "[a]ny motion pursuant to *this section* shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order Copies of any request for an extension of time shall be served promptly on the other parties." (Emphasis added.) The General Counsel, however, has not moved for reconsideration, rehearing, or reopening of the record; instead, he has moved to modify the Board's Order. Sec-

tion 102.48(d) thus does not explicitly apply to the General Counsel's motion.

Section 102.49 of the Board's Rules provides, in pertinent part, that

Within the limitations of the provisions of section 10(c) of the Act, and section 102.48 of these rules, until a transcript of the record in a case shall have been filed in a court, within the meaning of section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it.

The language of this section tracks that of Section 10(d) of the Act, which provides that at any time before the record in a case is filed in court, the Board may, on reasonable notice, modify or set aside, in whole or in part, any finding or order it has made or issued.

Thus, both Section 102.49 and Section 10(d) provide that the Board may modify its order at any time before the record in the case is filed in court; there is no explicit requirement that the Board act on the motion of a party. Indeed, the Board has long held that, under the plain language of Section 10(d), it has the authority to modify its orders *sua sponte*.⁴ Had the General Counsel not filed a motion at all, then, the Board could have modified its order *sua sponte* at any time before the record was filed in court. That being the case, it would be anomalous to find the Board without authority to modify its Order now, before the record has been filed in court, because a motion that was not even required for such a modification was not filed within the time period for filing other kinds of motions. In the absence of support in either the statute or the Board's Rules for such a result, we reject the Respondent's contention that the General Counsel's failure to comply with the timeliness requirements of Section 102.48(d)(2) prevents us from considering his motion.⁵

⁴ *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enf'd. 237 F.2d 907 (6th Cir. 1956). See also *Amazing Stores*, 290 NLRB 1131 (1988) (Board granted General Counsel's motion to clarify and modify order despite its raising remedial issues not raised by the General Counsel in exceptions); *R.J.E. Leasing Corp.*, 262 NLRB 373 fn. 1 (1982) (remedial matters may be addressed by the Board *sua sponte*).

⁵ We are aware that Sec. 102.49 states that the Board may modify an order "[w]ithin the limitations of the provisions of . . . section 102.48 of these Rules[.]" For the reasons discussed above, however, we find that the timeliness requirements of that section do not limit the Board's authority to modify its Order. See also Sec. 102.111(b) of the Board's Rules and Regulations, which states that "[w]hen the Act or any of these rules require the filing of a motion . . . such document must be received . . . before the official closing time of the receiving office on the last day of the time limit, if any, for such filing[.]" (Emphasis added.) As no motion is required for the Board to modify its Order, this section does not require such a motion to

Continued

¹ All dates refer to 1996.

² 321 NLRB No. 87.

³ The General Counsel also moved to modify the Order to reflect the correct name of the administrative law judge. As the Board issued such a correction on July 30, that portion of the General Counsel's motion is moot.

Our finding in this regard is also supported by considerations of fairness and the necessity to achieve the purposes of the Act.⁶ The Board intended to include a make-whole provision in the Order, but inadvertently failed to do so.⁷ There is no reason why employees who may have lost overtime work and earnings because of the Respondent's unfair labor practices should be denied relief because of our belated recognition of our earlier inadvertent error.⁸

II. SUBSTANTIVE MATTERS

The Respondent argues that the General Counsel's motion lacks merit because no employee has been shown to have lost opportunities for overtime work. It further argues that, because overtime work is voluntary, it is impossible to determine whether any employee lost overtime. We find that these contentions raise issues that should be resolved in compliance proceedings and, consequently, that they do not warrant denial of the General Counsel's motion.

ORDER

The General Counsel's motion to modify the Board's Order is granted. Accordingly, the Board's Order in the underlying Decision (321 NLRB No. 87) is modified, and the Respondent, Dorsey Trailers, Inc., Northumberland, PA Plant, Northumberland, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraphs 2(b) and (c) of the Order and reletter the subsequent paragraphs.

“(b) Make whole its employees, with interest, for any loss of earnings they may have suffered as a result of the Respondent's unlawful subcontracting of bargaining unit work, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf.d. 444 F.2d 502 (6th Cir. 1971), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

“(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.”

be received by any particular date prior to the filing of the record in court.

⁶Sec. 102.121 of the Board's Rules provides that “[t]he rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the Act.”

⁷As the General Counsel points out, such provisions normally are included as remedies for unlawful subcontracting. See *Olinkraft, Inc.*, 252 NLRB 1329, 1334-1335 (1980), modified on other grounds 666 F.2d 302 (5th Cir. 1982).

⁸*St. Regis Paper Co.*, 301 NLRB 1236, 1237 (1991), citing *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1969).

2. Substitute the attached notice to employees for that which issued on July 5, 1996.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT change the unit employees' working conditions, including their assignments to light duty work outside of their normal departments or classifications, without prior notice to and without bargaining with the Union.

WE WILL NOT subcontract bargaining unit work, including the production of trailers, without prior notice to and bargaining with the Union.

WE WILL NOT fail or refuse to comply with the Union's demand for relevant information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our unilateral implementation of policies relating to the practice of assigning injured employees to light duty work outside their normal departments or classifications and notify the Union and offer to bargain with it regarding any change in the terms or conditions of employment of the employees in the following unit:

All production, maintenance and stock room employees of Respondent at Northumberland, Pennsylvania, but excluding office clerical employees, professional employees, salesmen, guards, watchmen and supervisors as defined in the Act.

WE WILL rescind our decision to subcontract the production of trailers to Bankhead Enterprises, Atlanta, Georgia, and WE WILL notify the Union and on request bargain with the Union, as the designated and recognized exclusive collective-bargaining representative of the employees in the bargaining unit, over any such decision to subcontract the production of trailers.

WE WILL make our employees whole, with interest, for any loss of earnings they may have suffered as a result of our unlawful subcontracting of bargaining unit work.

WE WILL provide the Union the information which is requested by letters of May 29 and June 7 and 22, 1993, and any other information which is relevant and necessary to the performance of its duties as a bargaining representative.

DORSEY TRAILERS, INC